Supreme Court, U. S.
FILED
JUN 26 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974.

No. 73-1765

SYLVIA MEEK, et al.,

Appellants,

v.

JOHN C. PITTENGER, et al.,

Appellees,

and

JOSE DIAZ, et al.,

Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

MOTION TO DISMISS OR AFFIRM.

Of Counsel:
WILLIAM D. VALENTE,
Villanova, Pennsylvania. 19085

STRADLEY, RONON, STEVENS & YOUNG,
Philadelphia, Pennsylvania. 19102

WILLIAM B. BALL,
JOSEPH G. SKELLY,
127 State Street,
Harrisburg, Pennsylvania. 17101

JAMES E. GALLAGHER, JR.,
C. CLARK HODGSON, JR.,
1300 Two Girard Plaza,
Philadelphia, Pennsylvania. 19102

Attorneys for Appellees.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MOTION TO DISMISS OR AFFIRM.

Pursuant to Rule 16 of the Rules of this Court, Appellees Jose Diaz and Enilda Diaz, his wife, on their own behalf and as guardians of their minor children, Dalila, Jose, Jr., and Sergio Diaz; William Zimmerspitz and Nancy Zimmerspitz, his wife, on their own behalf and as guardians of their minor child, Rochelle Zimmerspitz; Thomas J. Hassall and Marie Hassall, his wife, on their own behalf and as guardians of their minor child, Patricia Anne; Daniel F. X. Powell and Anna T. Powell, his wife, on their own behalf and as guardians of their minor children, Kathleen A. and Daniel F. X., Jr.; Seth W. Watson, Jr. and Anne P. Watson, his wife, on their own behalf and as guardians of their minor child, Ellen P., move to dismiss this appeal, or, in the alternative, to affirm the judgment below, on the ground that it presents no substantial federal question warranting plenary review by this Court.

COUNTER-STATEMENT OF THE CASE.

Under Act 194, upheld by the court below, the Commonwealth provides certain defined "auxiliary" services (*e.g.*, testing, speech and hearing, psychological, etc.), on an individualized basis, to specific children found to be in need of educational services beyond those available in a general instructional program. These services are furnished directly to the child at the school in which he must meet compulsory attendance requirements.

Under Act 195 (also upheld by the court below) the Commonwealth loans textbooks, acceptable for public schools, to nonpublic school children. Under this Act it also loans to nonpublic schools instructional materials and instructional equipment useful to the education of these children. The instructional materials must be secular, neutral and non-ideological in nature. The instructional equipment also must be and, in addition, as the lower court has ruled, such that, "from its nature cannot be readily diverted to religious purposes."

The Appellants in their Complaint, attacked both Acts as violative on the face and as applied, of the Free Exercise and Establishment Clauses. The court below upheld both Acts, enjoining, however, the loan of such instructional equipment as is divertible to religious purposes.

The case comes to this Honorable Court with an ample evidentiary record. Thirty-one exhibits and the testimony of eleven witnesses (including Commonwealth officials, auxiliary service personnel, and parents) were received in evidence.

On June 17, 1974, this Court affirmed the decision of the United States District Court for the District of New Jersey in *Marburger v. Public Funds for Public Schools of New Jersey,* No. 73-120. The Pennsylvania statutes here involved are readily distinguishable from the invalid New

Jersey statute. The latter was essentially a parent cash reimbursement enactment and therefore invalid under the *Nyquist-Sloan* decisions of this Court. There was no evidentiary trial in *Marburger,* and the court therein was forced to resort to assumptions respecting constitutionally important facts. The extensive trial record in the Pennsylvania case is of critical constitutional significance on the issues of primary effect and entanglement. The opinion of the District Court in the Pennsylvania case (also coming from a court of the Third Circuit) was subsequent to that in *Marburger* and upheld the Pennsylvania statutes. The trial record in the Pennsylvania case shows that the court herein was completely aware of the statute and lack of record in *Marburger.* The opinion of that court, however, does not even refer to *Marburger,* while the partially dissenting opinion makes only the barest reference to it, thus evidencing a conclusion that, in the mind of the District Court, the *Marburger* statute bore little or no relationship to the statutes involved in the instant case.

QUESTIONS PRESENTED.

This appeal presents the following questions:

1. Does Act 194, on its face or as applied, violate the Establishment Clause of the First Amendment to the Constitution of the United States?

2. Does Act 195, on its face or as applied, violate the Establishment Clause of the First Amendment to the Constitution of the United States through the loan to nonpublic school children of textbooks, acceptable for use in public schools?

3. Does Act 195, on its face or as applied, violate the Establishment Clause of the First Amendment to the Constitution of the United States through loans to nonpublic schools of secular, neutral, nonideological instructional materials, useful for the education of pupils there enrolled?

4. Does Act 195, on its face or as applied, violate the Establishment Clause of the First Amendment to the Constitution of the United States through loans to nonpublic schools of secular, neutral, nonideological instructional equipment, of benefit to the instruction of nonpublic school children, and which from its nature cannot be readily diverted to religious purposes?

ARGUMENT.

I. This Appeal Presents No Substantial Federal Question Under the Establishment Clause .

The District Court was patently correct in its holding Act 194 (auxiliary services) to have no primary effect advancing religion, the primary effect of these programs instead being one of "meeting the state's primary objective of assuring that individual students receive those individualized services, outside the general program of instruction of their school, necessary for their individual progress in learning." *Meek v. Pittenger,* — F. Supp. — (E. D. Pa. 1974). See Appendix to Jurisdictional Statement * 36a. As to Appellants' contention that Act 194 calls for "excessive entanglements" between the state and religious schools, the District Court was likewise correct in stating:

> "From these cases [decisions of the Supreme Court on the 'entanglement' question] it seems clear to us that a decision on the entanglement criterion will in most if not all cases require a factual inquiry rather than a resort to examination of the face of the statutory issue or to judicial notice about how it may be expected to operate." *Id.* at —. Appendix 24a.

A full factual inquiry has taken place in this case, and the court below, with a factual record to go on, rather than supposition, felt itself compelled to conclude that Act 194 does not involve the Commonwealth in an impermissible entanglement with religion. See Appendix 36a-40a.

Likewise the District Court was obviously correct in its holding that "the textbook loan provisions of Act 195 are for First Amendment purposes indistinguishable from

* Hereinafter cited as "Appendix".

the 1965 New York textbook loan statute upheld in *Board of Education v. Allen* . . ." *Id.* at —. Appendix 40a. Nor can any real constitutional issue be raised with respect to the instructional materials provision of the Act. As the court stated:

> "No evidence has been presented from which we may infer that secular, neutral, nonideological instructional materials such as audio-visual materials, intended for group rather than individual use, are any more susceptible of diversion to a religious purpose than are textbooks. The expenditure is for a clearly identifiable secular purpose. The school is the custodian out of practical necessity because such materials are designed for group or multi-student use. . . . No greater entanglement is required by the operation of the instructional materials loan program than by the textbook loan program." *Id.* at —. Appendix 45a.

Logically, the District Court treated instructional equipment, provided under Act 195, precisely as it had treated instructional materials—limited, however, to equipment "which from its nature is incapable of diversion to a religious purpose . . ." *Id.* at —. Appendix 46a. This part of the decision below, upholding the loan of self-policing instructional equipment gives rise to no substantial federal question but rests, rather, upon the settled pronouncements of the Supreme Court of the United States.

Finally, although Appellants, in Paragraph 11 of their Complaint, raised the supposed issue of "political fragmentation and divisiveness along religious lines", they do not appear to press it here. The Appellees, upon trial, presented expert testimony on the real-life situation in Pennsylvania surrounding the passage of Acts 194 and 195, showing that *no* such speculative aberrations had taken place.

The Appellants introduced no evidence in support of their allegation and, as the court below rightly concluded, "it simply has not been proven." *Id.* at —. Appendix 50a.

CONCLUSION.

Under the settled principles laid down by this Court in cases involving the Establishment Clause, it is respectfully submitted that this appeal presents no substantial federal question. The Opinion and the Judgment of the court below should be affirmed or, in the alternative, the appeal should be dismissed.

Dated June 17, 1974.

Respectfully submitted,

Of Counsel:
WILLIAM D. VALENTE,
Villanova, Pennsylvania.
19085

STRADLEY, RONON, STEVENS & YOUNG,
Philadelphia, Pennsylvania.
19102

WILLIAM B. BALL,
JOSEPH G. SKELLY,
127 State Street,
Harrisburg, Pennsylvania.
17101

JAMES E. GALLAGHER, JR.,
C. CLARK HODGSON, JR.,
1300 Two Girard Plaza,
Philadelphia, Pennsylvania.
19102
Attorneys for Appellees.